ESTATE OF LON PHILPOTT, DECEASED

IBLA 76-551 Decided November 10, 1976

Appeal from decision of Alaska State Office, Bureau of Land Management, rejecting final proof and canceling homestead entry A-067526.

Affirmed.

HEADNOTES:

1. Homesteads: Generally--Homesteads: Final Proof

The affidavit of a witness in support of a homestead entryman's final proof will not be considered where it was given in the presence of the entryman, 43 CFR 1823.2-2, as it is the policy of the Department to assure that the testimony of a witness is his own and not that of the entryman.

2. Homesteads (Ordinary): Cultivation--Homesteads: (Ordinary): Final Proof--Homesteads (Ordinary): Residence

Where a homestead entryman submits the testimony of two witnesses with his final proof and that testimony does not show that the entryman has complied with the cultivation and residence requirements of the law, the final proof is defective on its face; final proof which is defective on its face will be rejected and the homestead entry canceled.

APPEARANCES: Linn H. Asper, Esq., Haines, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The Estate of Lon Philpott, deceased, appeals from the February 23, 1976, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting Philpott's final proof and canceling his entry, a homestead located near Haines, Alaska, A-067526.

Philpott filed his notice of location for the homestead on April 1, 1966, with the Alaska State Office, BLM. He filed his first "final" proof on April 1, 1971, at the end of the five-year life of the entry. This final proof was rejected on October 26, 1972, by the BLM for failure to show adequate residence and cultivation as required by the homestead laws and regulations. That part of the decision was approved by this Board in Lon Philpott, 13 IBLA 332 (1973). The Board nevertheless noted that Philpott might be eligible for a 5-acre homesite pursuant to the Homesite Act of May 26, 1934, 43 U.S.C. § 687a-1 (1970), and remanded the case for that reason to the Alaska State Office.

Philpott then filed a petition for reconsideration of the Board's decision. He alleged that he could prove compliance with the homestead laws and regulations, even though he had not previously done so. Reconsideration was granted on that basis. Lon Philpott (On Reconsideration), 16 IBLA 285 (1974). In remanding the case to the Alaska State Office, BLM, the Board specified:

> If, as it now appears, he [Philpott] has performed less than the requisite cultivation to entitle him to receive a patent to the entire 160 acres, he will be allowed to relinquish a part of the homestead claim and retain an area proportionate to his actual cultivation. Failure to file a final proof which is acceptable on this basis within the time to be specified by the Alaska State Office will result in cancellation of the claim. [Emphasis added.]

16 IBLA at 287.

As a result of that decision, Philpott filed another final proof, reducing his claim from 160 to 156 acres. The affidavits of three witnesses for the claimant were filed with the final proof. The BLM rejected the final proof and canceled the entry on February 23, 1976. It is that decision which is being appealed.

The BLM rejected Philpott's latest attempt at final proof, as defective on its face for failure of claimant's witnesses to corroborate his assertions. In so holding, the BLM excluded the affidavit of one Clayton Beard, because, contrary to a regulation,

43 CFR 1823.2-2, the testimony was taken with the claimant present. The other two affidavits were held not sufficiently corroborative of Philpott's claims of residency and cultivation.

[1] The homestead law, 43 U.S.C. §§ 270, 161 et seq. (1970), provides, among other things, that an entryman must prove by two credible witnesses: 1) that he has cultivated at least 1/16 of the land in his entry during the second year and 1/8 in the third year and thereafter; or 2) that the cultivation requirements should be reduced; and 3) that the entryman has resided on the land for at least 7 months each year. 43 U.S.C. § 164 (1970).

The affidavit of Clayton Beard does largely corroborate Philpott's assertions of residence and cultivation. However, it may not be considered. Lon Philpott was present when the affiant gave his testimony, contrary to the provisions of 43 CFR 1823.2-2:

> The testimony of each claimant should be taken separate and apart from and not within the hearing of either of his witnesses, and the testimony of each witness should be taken separate and apart from and not within the hearing of either the applicant or of any other witness, and both the applicant and each of the witnesses should be required to state in and as a part of the final proof testimony given by them that they have given such testimony without any actual knowledge of any statement made in the testimony of either of the others.

That regulation has been in effect in that form for at least 70 years. Instructions, 33 L.D. 480, 481 (1905); 43 CFR 210.8 (1938); 43 CFR 1823.2-2 (1964); see also Cassius C. Hammond, 7 L.D. 88 (1888). The purpose of the regulation is clear. The testimony of the affiant should be his and his alone, not that of the entryman. 1/ Moreover, the affiant can hardly plead ignorance of the requirement of the regulation. At the beginning of the witness statement form there is a notation which states:

1/ Without making any findings on this point or resting our decision on this basis, it does appear that Beard's testimony is actually that of the claimant. The answers to many questions are either identical or very nearly so in their wording, where a reasonable person might at least expect some difference. For example, the claimant and witness both gave identical answers right down to use of an ampersand to the question "Description of Improvements," "dwelling house, including toilet & plumbing, roads, sheds, tools, land clearing, equipment, etc."

> The officer before whom this proof is made will see that all answers are complete and responsive to the questions and bring out the pertinent facts showing the entryman's compliance or noncompliance with the laws under which the land was entered. Neither the claimant nor the other witness may be present while the testimony of this witness is being taken.

Appellant has submitted another affidavit of Clayton Beard asserting that the testimony he originally gave is true and accurate. The homestead law requires that the entryman's compliance with the law be proved by two credible withesses. Since the enactment of the homestead law, the Department has consistently held that the testimony of each witness must be based on his own knowledge. For that reason, the Department has always required that the witnesses' knowledge should be tested by appropriate examination and cross-examination. Instructions, 3 L.D. 133, 134 (1884), accord, Instructions, 3 L.D. 211 (1884); Fred. King, 4 L.D. 253, 254 (1885); Halvor Hansen, 4 L.D. 260 (1885). At the same time, the Department has also required that the witnesses and entryman should be examined separately to insure that the testimony is that of the witness. 43 CFR 1823.2-2. 2/

[2] The Alaska State Office, BLM, rejected the final proof as deficient on its face because neither of the other two affidavits proved the entryman's assertions of residence and cultivation. Final proof for a homestead entry must be rejected and the entry canceled when the final proof on its face fails to show compliance with the residence and cultivation requirements. Lon Philpott, 13 IBLA 332, 335 (1973); Lois A. Mayer, 7 IBLA 127, 129 (1972); Ronald H. Echola, A-30831 (November 16, 1967); Frederick N. Van Horn, A-29081 (November 20, 1962). Preston Ostrander indicated in his affidavit that he had not seen the land for the first 3 years of the entry. Consequently, his affidavit does not prove either residence or cultivation during the first 3 years of the entry, 1966, 1967, and 1968. The other affiant, and the claimant's brother, Eugene Harold Philpott, testified that he was not present in either 1968 or 1970. Moreover, he was only present for 2 months in 1966 and 1967 and 3 months in 1969. Therefore, for none of the years 1966-1970 does the affiant's statements prove residence of the entryman. Nor do affiant's
statements prove any cultivation in 1968 or 1970.

2/ Even if the affidavit of Clayton Beard were to be accepted, and because neither of the other affidavits proves the entryman's residence or cultivation, the final proof would still be deficient for lack of proof from at least two witnesses as required by the statute, 43 U.S.C. § 164 (1970).

The entryman has been extended several opportunities by both the BLM and this Board to submit an adequate final proof. In spite of repeated warnings of the consequences, he failed to do so. Because the final proof on its face fails to show compliance with the law, the final proof must be rejected and the entry canceled.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Edward W. Stuebing
Administrative Judge

We concur:

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Anne Poindexter Lewis
Administrative Judge

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Joan B. Thompson
Administrative Judge